

**TO: Hon. Anthony J. Scirica, Chair  
Standing Committee on Rules of Practice and  
Procedure**

**FROM: W. Eugene Davis, Chair  
Advisory Committee on Federal Rules of Criminal  
Procedure**

**SUBJECT: Report of the Advisory Committee on Criminal  
Rules**

**DATE: May 10, 2001**

## **I. Introduction**

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26 in Washington, D.C. and acted on the proposed restyling of the Rules of Criminal Procedure and on proposed substantive amendments to some of those rules. The Minutes of that meeting are included at Appendix E.

## **II. Action Items—Summary and Recommendations.**

This report contains two action items:

- Approval and forwarding to the Judicial Conference of restyled Criminal Rules 1 through 60 (Appendix A); and
- Approval and forwarding to the Judicial Conference of substantive amendments to eight rules—Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 (Appendix B).

## **III. ACTION ITEM—Approval and Forwarding to Judicial Conference of Restyled Criminal Rules 1-60 (Appendix A)**

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### **B. Publication of Style and Substantive Packages for Public Comment**

In June 2000, the Standing Committee authorized publication for public comment of two packages of amendments. The purpose of presenting the proposed amendments in two separate pamphlets was to highlight for the public that in addition to the “style” changes in Rules 1 to 60, a number of significant (perhaps controversial) amendments were also being proposed.

#### **1. The “Style” Package**

The first package (Appendix A)—referred to as the “style” package, included Rules 1 to 60. For those rules where the

Committee was proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41,\* and 43), the language containing those changes was deleted from the “style” package. A “Reporter’s Note” explained to the public that additional substantive changes for that particular rule were being published simultaneously in a separate package.

## **2. The “Substantive” Package**

The second package (Appendix B)—referred to as the “substantive” package, consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41,\* and 43, which all provide for significant changes in practice. This version of the package included not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a “Reporter’s Note” explained that another version of each of these rules (which included only style changes) was being published simultaneously in a separate package.

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\* The Advisory Committee on Criminal Rules withdrew the proposed “substantive” amendments to Rule 41 for further consideration.

**IV. ACTION ITEM—Approval and Forwarding to Judicial Conference of Amendments to Rules 5, 5.1, 10, 12.2, 12.4, 26, 30, 35, and 43 in the Substantive Package (Appendix B)**

**A. The Substantive Package of Amendments—An Overview**

In June 2000, the Standing Committee approved publication of a separate package of amendments, known as the “substantive” package. That package originally consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41,\* and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and a “Reporter’s Note” explained to the public that another version of each of these rules (which includes only style changes) was being published simultaneously in a separate package.

The Advisory Committee received approximately 80 written comments, and heard the testimony of five witnesses, on the proposed substantive amendments. Most of the comments focused on the proposed amendments to Rules 5, 10, and 26, which would provide for video conferencing of initial appearances and arraignments and for video transmission of trial testimony. Those comments and testimony are summarized by rule at Appendix C.

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\* The Advisory Committee on Criminal Rules withdrew the proposed “substantive” amendments to Rule 41 for further consideration.

**B. Presentation of Substantive Package to Judicial Conference**

As noted, above, the Advisory Committee published two separate packages of amendments: the “style” package and the “substantive” package. Throughout the post-publication review of the public comments and revisions, and for purposes of discussion by the Standing Committee, the Advisory Committee has maintained the two distinct packages.

The “style” package of amendments to Rules 1-60 is designed to stand on its own and could be presented to the Judicial Conference and Supreme Court in that format. The proposed amendments in the separate, “substantive” package include not only the style changes to those particular rules, but more importantly, the significant substantive amendments that may generate some controversy. Following the public comment, the Committee made a number of changes to proposed Rules 5 and 10 and withdrew two amendments that seemed particularly controversial—the amendments to Rule 32 and 41. The Committee does not believe that the substantive amendments as presently written will draw significant controversy.

The Standing Committee must decide whether to submit the style and substantive packages separately to the Judicial Conference. Whatever the Standing Committee decides to do in this respect, the Advisory Committee assumes that the rules that the Judicial Conference approves will be blended together for submission to the Supreme Court.

**C. Rule-by-Rule Summary of Post-Publication Changes to the Substantive” Package**

**1. Rule 5. Initial Appearance: Video Teleconferencing**

The substantive change to Rule 5 is in new Rule 5(d), which permits video teleconferencing for an appearance under this rule—if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment was proposed to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant’s presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process.

As originally presented to the Standing Committee in January 2000, the proposed rule included a provision to use video teleconferencing for initial appearances—if the defendant consents. Upon further reflection, the Advisory Committee recommended, and the Standing Committee adopted, a proposal to publish not only that provision but also an alternate provision that would permit the court to conduct such procedures, even without the defendant’s consent. Thus, the published version offered two alternatives.

After further discussion, the Advisory Committee recommends, by a vote of 7 to 4, that the Standing Committee approve the version that requires the defendant’s consent.

The public comment (which included responses from district judges and magistrate judges) on the proposed amendments was mixed. For example, on behalf of the Committee on Defender Services, its chair objected to the use of video teleconferencing without the defendant’s consent and expressed reservations about its use under any circumstances. The Committee nonetheless believes that in appropriate circumstances the court and the defendant should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would

be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Nor does the rule specify any particular technical requirements for the video conferencing system to be used.

The Committee Note to Rule 5 has been expanded to include additional discussion on the factors that a court may wish to consider in deciding whether to use video teleconferencing for initial appearances.

***Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 5 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the “substantive” version be substituted for the “style” version.***

## **2. Rule 5.1. Preliminary Hearing: Authority of Magistrate Judge to Grant Continuance**

Rule 5.1(c) contains a substantive change that creates a conflict between the rule and a federal statute—18 U.S.C. § 3060(c). The proposed amendment is being offered at the recommendation of the Judicial Conference at its Spring 1998 meeting.

In 1997, the Advisory Committee considered a proposed amendment to Rule 5(c), which would permit a magistrate judge to continue a preliminary hearing even if, the defendant objects. The Committee decided to recommend to the Standing Committee that it first propose legislative changes to § 3060(c). The Standing Committee, however, believed it more appropriate for the Advisory

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Committee to propose a change to Rule 5(c) through the Rules Enabling Act and remanded the issue to the Advisory Committee. At its October 1997 meeting, the Committee considered the issue and decided not to pursue the issue any further, and reported that position to the Standing Committee at its January 1998 meeting.

The matter was ultimately presented to the Judicial Conference during its Spring 1998 meeting. In its summary of actions, the Conference remanded the issue to the Advisory Committee with:

instructions to the Rules Committee to propose an amendment to Criminal Rule 5.1(c) consistent with the amendment to 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee.

Revised Rule 5.1 includes language that expands the authority of a magistrate judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, if the defendant does not consent, then the government must present the matter to a district judge. As noted above, the proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only a district judge to grant a continuance when the defendant objects. The Committee believes that this restriction is an anomaly. The Committee also believes that the change will promote judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060. The Committee understands that if the amendment is approved, the appropriate Congressional staff will be advised and an amendment of the existing law pursued.

No post-publication changes were made to Rule 5.1, other than minor stylistic changes.

***Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 5.1 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the “substantive” version be substituted for the “style” version.***

### **3. Rule 10. Arraignment**

The proposed amendments to Rule 10 create two exceptions to the requirement that the defendant be personally present in court for an arraignment. First, revised Rule 10(b) permits the court to hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. Second, revised Rule 10(c) permits the court to hold arraignments by video teleconferencing—with the defendant's consent. A conforming amendment will also be made to Rule 43.

#### **a. Waiver of Appearance at Arraignment: Rule 10(b)**

Although the Committee considered the traditional objections to permitting a defendant to waive a personal appearance, the Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence—a procedure used in some state courts. Under Rule 10(b), the defendant must give his or her consent in writing and it must be signed by both the defendant and the defendant's attorney. Finally, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, or entering a conditional plea, a nolo contendere plea, or a guilty plea. In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally.

The amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for time limits in other rules.

The Committee voted unanimously to recommend approval of Rule 10(b).

**b. Video Teleconferencing for Arraignments:  
Rule 10(c).**

Rule 10(c) addresses the second substantive change in the rule. That rule would permit the court to conduct arraignments through video teleconferencing. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases over the defendant's objection. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990) (Rules 10 and 43 require personal appearance; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment but was later withdrawn from consideration in order to consider the results of several planned pilot programs. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment

also parallels a proposed change Rule 5(d) that would permit initial appearances to be conducted by video teleconferencing.

When this rule was published for public comment, an alternative version was also provided. The alternative version of Rule 10(c) would have permitted the court to use teleconferencing without the defendant's consent.

In deciding to adopt the amendment, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That procedure can also present security risks to law enforcement and court personnel.

Unlike the waiver for any appearance whatsoever at an arraignment, noted above, this particular provision would not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court.

The Committee voted 8 to 3 to recommend this amendment to Rule 10. As with Rule 5, above, the Committee Note has been expanded to address issues that the court may wish to consider in using video teleconferencing.

***Recommendation: The Advisory Committee recommends that the substantive amendments to Rule 10 be approved and forwarded to the Judicial Conference with the recommendation that if they are approved, the "substantive" version be substituted for the "style" version.***

**4. Rule 12.2. Notice of Insanity Defense; Mental Examination**

Rule 12.2, which addresses the notice requirements for presenting an insanity defense or evidence of mental condition on the merits, contains several significant amendments.

First, Rule 12.2(c) clarifies that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, under Rule 12.2(b), the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, Rule 12.2(c) addresses the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and sets out when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case. Rule 12.2(d).

The Committee made several post-publication changes to Rule 12.2. First, it deleted the words “upon motion of the government” from Rule 12.2 (c)(1) to reflect that examinations may also be requested by either the defendant or the government. Second, Rule 12.2(c)(4)(A) has been modified to clarify that a defendant's statements are admissible only after the defendant has introduced evidence requiring the notice in Rule 12.2(a) or (b)(1). Finally, Rule 12.2(c)(4)(B) has been amended to clarify that introduction of expert testimony in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2) will trigger use of a defendant's statements.

The Committee voted unanimously to recommend approval of the substantive amendments to Rule 12.2.

***Recommendation: The Advisory Committee recommends that the substantive amendments to Rule 12.2 be approved and forwarded to the Judicial Conference with the recommendation that if they are approved, the “substantive” version be substituted for the “style” version.***

#### **5. Rule 12.4. Disclosure Statement (New Rule)**

The Committee made several post-publication changes to new Rule 12.4. First, regarding Rule 12.4(a)(2), the Committee recognized the potential difficulty in requiring the prosecution to learn all of the disclosable information about an organizational defendant early in the proceedings. Thus, the Committee added the words, “to the extent it can be obtained through due diligence” at the end of that section. Second, the language in Rule 12.4(b)(1) was intended to track similar language in the Civil Rules counterpart to this rule but that approach creates problems in applying the requirements to a criminal proceeding. Thus, the Committee modified Rule 12.4(b)(1) to indicate that the disclosure requirements are triggered with the defendant’s initial appearance. Finally, the Committee has recommended deleting the reference in Rule 12.4(a)(1)(B), which delegates authority to the Judicial Conference to prescribe additional disclosure requirements that may preempt local rules governing disclosure.

***Recommendation: The Advisory Committee recommends that Rule 12.4 be approved and forwarded to the Judicial Conference with the recommendation that it be approved.***

**6. Rule 26. Taking Testimony: Video Transmission of Testimony**

The proposed amendment to Rule 26(b) would permit the court to use remote transmission of live testimony. Current Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by the rules, an Act of Congress, or any other rule adopted by the Supreme Court. For example, Rule 15 recognizes that depositions, in conjunction with Federal Rule of Evidence 804, may be used to preserve and present testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. The revision to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

As a result of public comments, the Committee modified the rule in several respects. First, the rule was changed to make it clear that the Committee envisions two-way video transmission. Second, the term “compelling circumstances” was changed to “exceptional circumstances” to reflect the standard for taking depositions in Rule 15 and the standard applied by courts that have addressed the Confrontation Clause issue. Finally, the Committee Note has been expanded.

Although a number of public comments raised concerns about whether the amendment would violate a defendant’s rights under the Confrontation Clause, the Committee believes that the rule is constitutional and that permitting use of video transmission of testimony only in those instances when certain requirements are met, is appropriate. *See United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (use of remote transmission of unavailable witness’ testimony did not violate confrontation clause).

The amendment recognizes that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. Deciding what safeguards are appropriate is left to the sound discretion of the trial court. That topic is discussed in an expanded Committee Note.

The Committee voted unanimously to recommend approval of the amendment to Rule 26.

***Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 26 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the “substantive” version be substituted for the “style” version.***

## **7. Rule 30. Jury Instructions**

The amendment to Rule 30 would permit the court to request the parties to submit their requested instructions before trial. The current rule indicates that a court may request those instructions after the trial has started. Several public comments raised concerns that permitting the court to require the defense to disclose its theory of the case prior to trial might be problematic. The Committee concluded, however, that the court should have the option of requesting pretrial submission of requested instructions and has included a comment in the Note to the effect that the amendment is not intended to change the practice of submitting supplemental requests after trial has started.

The Committee has also addressed the issue of waiver of objections to the instructions by adding a sentence at the end of Rule

30(d). The Committee decided not to address more explicitly the issue of whether a party must renew an objection after the instructions are given.

The Committee voted 9 to 2 to recommend approval of the amendment to Rule 30.

***Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 30 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the “substantive” version be substituted for the “style” version.***

## **8. Rule 35. Correcting or Reducing Sentence**

Rule 35 contains several changes. First, as noted, *supra*, the published version of Rule 35 used the term “sentencing” to describe the triggering element for the two “time” requirements in the rule. While the rule was out for public comment, and at the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term “sentencing.” The Committee’s initial decision was to use the term “oral announcement of the sentence.” That is the view of the majority of the courts that have addressed the issue. Upon further reflection, however, the

Committee decided to add a new provision (now Rule 35(a)) and define sentencing as the entry of the judgment. Even though that may result in the change in practice in some circuits, it is more consistent with describing the triggering event, for example, of an approval of a sentence.\*\*

Rule 35(c) (published as Rule 35(b)) includes a substantive change that had been under consideration apart from the restyling project. Rule 35(c) includes new language to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. The current rule, however, did not address the issue and the courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule, the court urged

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\*\* At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting, to withdraw the proposal defining “sentencing” as the entry of the judgment. The Committee also agreed with the advisory committee’s recommendation to publish the withdrawn proposal for public comment.

an amendment of the rule to:

address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n.13.

The amendment to Rule 35(c) is intended to address the instances identified by the court in *Orozco*. The proposed amendment would not eliminate the one-year requirement as a generally operative element.

Following additional consideration of the rule, the Committee has recommended, post-publication, a slight expansion in Rule 35(c) that would permit the government to file a motion for sentence reduction when the defendant is not aware of the helpful nature of the information until after one year, but provides it to the government promptly upon learning of its usefulness.

The Committee voted unanimously to recommend the approval of the proposed amendments to Rule 35.

***Recommendation: The Advisory Committee recommends that the substantive amendments to Rule 35 be approved and forwarded to the Judicial Conference with the recommendation that if they are approved, the “substantive” version be substituted for the “style” version.***

**9. Rule 43. Defendant's Presence**

The amendments to Rule 43 are conforming changes, that hinge on approval of Rules 5 and 10 concerning video teleconferencing, and Rule 10 that permits the defendant to waive appearance at an arraignment. The Committee made no post-publication changes to Rule 43.

*Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 43 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the “substantive” version be substituted for the “style” version.*

**VI. INFORMATION ITEM—Withdrawal of Substantive Amendment to Rule 32 and Deferral of Substantive Amendment to Rule 41**

**A. Rule 32. Sentencing: Ruling on Material Matters.**

The Standing Committee approved publication of an amendment to Rule 32 that would have required the sentencing judge to resolve objections to “material” matters in the presentencing report—even if those matters would not directly affect the actual sentence. The rationale for that proposed change rested on the understanding that the presentence report is used by the Bureau of Prisons in making important post-sentencing decisions regarding such issues as the ability of the defendant to receive drug treatment. Upon further consideration, and after considering comments from the Bureau of Prisons, the Committee decided to withdraw the recommendation. Nonetheless, the Committee decided to include information in the

Committee Note that would draw attention to the potential problems associated with incorrect information in the presentence report.

**B. Rule 41. Search and Seizure: Covert Searches**

The Standing Committee approved publication of an amendment to Rule 41 that would have addressed the procedures for issuing a warrant for covert entries. After considering the public comments on the rule, and further discussion, the Committee has decided to defer further action on that amendment. The Committee envisions continued discussions of the amendment and contemporaneous consideration of amendments to Rule 41 that would address the topic of issuing what are often referred to as “tracking device” warrants.

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Appendix A. Style Package—Rules 1 to 60

Appendix B. Substantive Package—Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43.

Appendix C. Summary of Public Comments on Substantive Amendments (Not Included)

Appendix D. Summary of Public Comments on Style Package (Not Included)

Appendix E. Minutes of April 2001 Meeting (Not Included)